No. 11,786

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

KANAME FUJINO,
Appellant,

vs.

TOM C. CLARK, Attorney General of the United States as Successor to the Alien Property Custodian,
Appellee.

On Appeal from the District Court of the United States for the Territory of Hawaii.

BRIEF FOR APPELLEE.

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Subject Index

Table of Authorities Cited

Cases

Statutes

Miscellaneous

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OPINION BELOW.

The opinion of the District Court (R. 49-60) is reported at 71 F. Supp. 1.

JURISDICTION.

The jurisdiction of the United States District Court for the Territory of Hawaii was founded (R. 50) upon Section 9(a) of the Trading With the Enemy Act, 40 Stat. 411, 50 U.S.C. App. 9(a). The judgment of that Court was entered June 5, 1947 (R. 62).

Notice of appeal was filed August 30, 1947 (R. 444). The jurisdiction of this Court is founded upon Section 128 of the Judicial Code, 28 U.S.C. Section 225.

STATEMENT.

This is a suit brought by the appellant under Section 9(a) of the Trading With the Enemy Act, 40 Stat. 411, 50 U.S.C. App. 9(a), to recover six parcels of land situated in the City and County of Honolulu, Territory of Hawaii, which have been vested by the Alien Property Custodian[1] pursuant to the Trading With the Enemy Act and are claimed by the appellant as his property. The United States District Court for the Territory of Hawaii, Honorable J. Frank McLaughlin, judge, gave judgment dismissing the action. The facts, as found by the District Court and as shown in the record, may be summarized as follows:

At the time of bringing this action the appellant was a citizen of the United States and a resident of Honolulu, Territory of Hawaii (Fdg. 2, R. 50). He was born in the Territory of Hawaii on February 23, 1919 (R. 142). His parents were Japanese citizens (Fdg. 6, R. 50); his father had resided in Hawaii

[1]For convenience, the term "Alien Property Custodian" will be used throughout this brief to refer, as the context may require, to the Alien Property Custodian (see Executive Order No. 9095, March 11, 1942, 7 F.R. 1971, as amended) or to the Attorney General as Successor to the Alien Property Custodian (see Executive Order No. 9788, October 14, 1946, 11 F.R. 11981). The Attorney General was substituted as a party defendant in the District Court (R. 67).

since about 1906 or 1908 (R. 106). They had three children: the appellant and two daughters, both older than the appellant (R. 181) and both married to employees of their father's business (R. 182). The appellant resided in Hawaii until August, 1934, when, at the age of 15, he went to Japan "at my father's say," remaining there for six years to study at the Waseda Business School in Tokio (R. 144-5). He left Japan on April 26, 1941, returning to Hawaii on May 4, 1941 (R. 146). Before leaving Japan he took steps to abandon his Japanese citizenship (R. 146).

Prior to 1940 the appellant's father, Yotaro Fujino, was engaged in business in the Territory of Hawaii under the names of The Oahu Junk Company and The Oahu Lumber and Hardware Company (R. 71). The facilities of the business were located on four of the six parcels of land here involved, and possibly a fifth as well (R. 72, 122-3, 157). The land and structures thereon were regarded as property of the business (R. 391) and were necessary and indispensable to its conduct and operation (Fdg. 11, R. 53; R. 309). Their present value is in excess of $29,000 (R. 10, 28).

In the early part of 1935 Yotaro Fujino and his wife left for Japan, where they have remained since, except for one short visit to Hawaii which he made during 1935 (R. 73, 77, 258). On his departure he left the business in charge of two employees, Tsuda and Tsutsumi, who were made manager and assistant manager of his business enterprises and in favor of whom he and his wife executed powers of attorney (R. 77-8, 259-60; Pltf. Exhs. A, B and C, R. 459-67).

Tsuda and Tsutsumi were citizens of both the United States and Japan (R. 256, 365). Tsuda had been employed at The Oahu Junk Company since 1921 (R. 257), Tsutsumi since 1928 (R. 367). After Yotaro Fujino's departure they handled "the general routine of the business . . . daily routine, buying and selling, and things like that, in the ordinary way . . ." (R. 288). On non-routine matters they requested Yotaro Fujino's instructions by letter (R. 286-8). From 1935 until Pearl Harbor Mr. Fujino was in fairly frequent correspondence with Tsuda and Tsutsumi (R. 175-6, 284-8, 375-80, 399).

Between April and July, 1940, Mr. Robert Murakami, an attorney practicing in Hawaii who had since 1930 handled all Yotaro Fujino's legal business (R. 71, 102) was in Japan on a "vacation trip" (R. 82). He testified that he spent six or seven days with Yotaro Fujino (R. 82), who was then about 55 years old (R. 109). Yotaro Fujino discussed with Murakami "what he wanted to do . . . about his property, his business, real property and all other property which he had in the Territory" (R. 83). The "strained relationship between the United States and Japan" entered into these discussions (Fdg. 7, R. 51; R. 117-8). Other considerations discussed, according to Murakami, were "the advantages of the incorporated form of business enterprise as compared to proprietorship," (R. 83), the desirability of making gifts to avoid inheritance tax (R. 83-4), and the fact that under Japanese law Yotaro Fujino's personal property would probably go to collateral heirs in Japan

rather than to his children, should he die intestate (R. 84). Murakami emphasized that "some method of disposition should be devised by him while he was hale and healthy" (R. 84). It was tentatively decided that the business should be incorporated, that substantial stock holdings in the corporation should be placed in the name of Yotaro Fujino's children, and that he should retain control over them by having them give him notes for the value of stock issued to them, secured by pledges of the stock (R. 87-8, 118-9). Murakami testified that Yotaro Fujino also said that his real estate should not be put into the new corporation (R. 88-9). The appellant, who was then 21 and had almost finished his six-year course of the Waseda Business School, did not participate in any of these discussions (R. 114-15), although he was then living with his father (R. 174).

After Murakami's return to Hawaii the proposed incorporation was set in motion pursuant, apparently, to further instructions of Yotaro Fujino (R. 292-4, 374).[2] On November 27, 1940, the Oahu Junk Com-

[2]These instructions were said to have been given by a letter in Japanese from Yotaro Fujino to one Yamamoto (an employee of the business who conducted its correspondence in the Japanese language, R. 75-6). The letter was not put in evidence; the only evidence relating to it is the testimony of Tsuda and Tsutsumi that Yamamoto called them to his house and, having before him a letter in Japanese characters, made statements as to Yotaro Fujino's instructions which he purported to be reading or summarizing from the letter (R. 265-8, 292-4, 374, 381-2). Neither Tsuda nor Tsutsumi read the letter or examined it with any care. Tsuda testified that he was able to see the writing while Yamamoto held it (R. 292); at first he identified the handwriting positively as Yotaro Fujino's (R. 266), but later he admitted that he "would not make sure" of this (R. 268).

pany, Ltd. was incorporated with a capital of $1,000 represented by ten shares (Pltf. Exh. D, R. 468; R. 92). On December 2, 1940, Yotaro Fujino, through his attorneys-in-fact, executed an indenture purporting to transfer "all of his business and assets" exclusive of real property to the new corporation in exchange for 790 shares of its stock (Def. Exh. 4, R. 449). The 790 shares were issued in the names of Yotaro Fujino, his wife, his daughters and the appellant.[3] . . . The appellant and his sisters each executed notes in favor of Yotaro Fujino for the par value of the shares, pledging the shares as security for the notes (R. 93-4, 119, 133-4, 271, 412). The appellant's note and pledge were executed by Tsuda and Tsutsumi acting through a power of attorney which the appellant executed for that purpose (R. 178) and which is still unrevoked (R. 255). (Apparently appellant's mother gave a similar note, R. 428-33). This was done to carry out Yotaro Fujino's repeatedly expressed desire to retain "parental control" (R. 271, 295, 383).

In the indenture conveying Yotaro Fujino's assets to the corporation the corporation assumed all of his

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[3]The total holdings in the corporation were (R. 131):

	Original 10 shares	Additional 790 shares	Total
Yotaro Fujino (appellant's father)	2	238	240
Chiyono Fujino (appellant's mother)	1	118	119
Kaname Fujino (appellant)		200	200
Katsue Fujieki (appellant's sister)	2	117	119
Shizue Maneki (appellant's sister)	2	117	119
Tokuichi Tsuda (employee)	1		1
Yasuo Tsutsumi (employee)	1		1
S. Yamamoto (employee)	1		1
	10	790	800

liabilities connected with the business (R. 449). A schedule of those liabilities which was attached to the indenture listed an outstanding indebtedness covering $20,000 to the Bishop National Bank of Hawaii, most of which was unsecured (R. 454). Nevertheless, Yotaro Fujino on March 13, through his attorneys-in-fact, mortgaged the six parcels of land owned by him to the Bank for $15,000 as additional security for this indebtedness (Pltf. Exh. G, R. 488; R. 97-8; 125-8).

A few days later, on March 21, 1941, there was executed a deed purporting to convey, subject to the previous mortgage, the six parcels of land (including the buildings thereon) to the appellant as a gift (Pltf. Exh. H, R. 501). The deed was signed by Tsuda and Tsutsumi purporting to act as attorneys for Yotaro Fujino and his wife (R. 507). They based their assumption of authority to execute the deed on a new power of attorney executed February 20, 1941, by Yotaro Fujino and recorded March 17, 1941 (Pltf. Exh. E, R. 479). This power authorized them *inter alia*

> To carry on and transact all my business in the Territory of Hawaii; to enter into, perform and carry out, and to rescind, terminate and cancel contracts of all kinds; to buy, take on lease and otherwise acquire, and to hold, sell, mortgage, hypothecate, pledge, lease and otherwise dispose of, and in any and every way and manner deal with real property, leaseholds and other interests in real property, stocks, bonds, goods, wares, merchandise, choses in action and other property and rights of any nature whatsoever in possession or in action; . . .

It contained no express authority to make a gift. On the appellant's return to Hawaii he was shown the deed and told by Tsuda to have it recorded (R. 153-4). He was told of the existence of the mortgage; after recording the deed he returned it to the possession of the mortgagee and, at Tsuda and Tsutsumi's instructions (R. 211), he endorsed the mortgage note (R. 155-6). At the trial he was ignorant of the amount of the mortgage (R. 155).

While the foregoing transactions were being executed, the appellant was living at his father's home in Japan. He did not discuss these proposals with his father; he received his first information of them either in September or October, 1940, or in December, 1940, when he was told by his father to execute a power of attorney in favor of Tsuda and Tsutsumi (R. 149-50, 178-9). He said that he believed the power was executed in order that a note could be given to his father (R. 151). He did not assist his father in any of his business affairs nor did he read any correspondence relating to his father's business in Hawaii (R. 176-7). He was "absolutely ignorant . . . of any details or affairs of the business of The Oahu Junk Company" (R. 177). As he testified, his father "just told me to do my own studying" (R. 176). He planned on his return to Hawaii to embark on another four-year course of study at the University of Hawaii (R. 174, 183). He testified that his father, referring to his interests in Hawaii, had said that "eventually he will . . . give it all to me" but that for the present "since I was going to school, and I did not show my

merits yet, so he told me to study hard and when I come back, after I go to school, help in that store" (R. 180; see also R. 151, 229).

These statements accurately reflect what happened. It is true that in August, 1941, on instructions from Yotaro Fujino, the appellant was elected President of the Company (R. 316-17). The appellant, however, attended the University of Hawaii from September, 1941 until the spring of 1943 (R. 186, 211). He worked at the Junk Company during the summer and in the afternoon after school, waiting on customers and doing "other little tasks" (R. 184-5, 212). During this entire period, however, he "had nothing to do with the management of the business at all" (R. 185). The routine management continued, as before the incorporation, to be handled by Tsuda and Tsutsumi (R. 155, 184-5, 212), and they continued to correspond frequently with Yotaro Fujino concerning the business (R. 375-80). This correspondence was usually conducted through one Yamamoto, another employee of the business who could read and write Japanese (R. 284). Most of the letters were left at Yamamoto's house (R. 334). His widow testified that immediately after the Japanese attack on Pearl Harbor she "was afraid" and burned "everything in Japanese" (R. 399), including at least 30 envelopes presumably containing letters (R. 403). Nevertheless, some letters showing the extent of Yotaro Fujino's continued activity in the business were produced by the appellant at the trial. Thus on June 30, 1941, Mr. Fujino wrote requesting that monthly statements of the corpora-

tion's financial condition be continued (Deft. Exh. 7-A, R. 457). In August, 1941, he wired instructions that the appellant should be elected president of the corporation and this was done (R. 316-17). In July or August, 1941, he wrote discussing the impact of the freezing regulations and suggesting that some sort of barter system might be set up (R. 320). He corresponded a number of times with respect to particular shipments of iron or rubber scrap to Japan. (R. 317; Deft. Exhs. 5-A, 8-A, 9, R. 455-7, 458; Pltf. Exhs. L-1, M-1, O, Q, R. 515-18, 525, 527, 528). Tsuda and Tsutsumi always tried to carry out his instructions carefully and completely (R. 321).[4]

Despite the fact that the land on which the corporation's facilities were located was not conveyed to the corporation but was purportedly given to the appellant, there was no doubt in anyone's mind that the corporation would be able to continue using it (R. 309-10, 344-46). No wirtten lease was thought necessary (R. 188-9). No rental was paid to the appellant for its use until August, 1941. The appellant at no time demanded any rental and testified that he had had no intention of demanding any during the four years that he planned to attend the University of Hawaii (R. 241-2); the suggestion that a rental should be paid was made by Tsuda and Tsutsumi, who set the figure at $300 a month (R. 185-6, 298-302). Although Tsuda testified that this rental was "somewhat

[4]In the fall of 1941 Yamamoto made a trip to the Orient during which he apparently traveled in China and the Philippines with Yotaro Fujino and transacted business on behalf of the corporation. (R. 74, 316-18, 376-8.)

cheap" (R. 278), there was no bargaining as to its amount, the appellant simply accepting without question the figure suggested by Tsuda and Tsutsumi (R. 185, 189, 204). The first rental payment, covering back rental to the date of the deed (Fdg. 14, R. 54) was made on August 22, 1941 (R. 185). The appellant testified that Tsuda and Tsutsumi then told him to start a checking account (R. 237, 240) which he did (R. 239). This was less than a month after Yotaro Fujino's accounts had been frozen (R. 300-01) pursuant to Executive Order No. 8389, as amended, which was made applicable to nationals of Japan on July 26, 1941. Executive Order No. 8832, 6 F. R. 3715. The Company's accounts were also frozen pursuant to that Order (R. 329). The appellant denied that he had opened his checking account because his father's account was frozen, but he admitted that he had discussed the freezing with Tsuda and Tsutsumi (R. 240, 300-01). Tsuda testified that although prior to August the Company had had sufficient cash to make rental payments, it had not done so because no demand for payment had been made (R. 278, 302). He gave no reason for his decision in August, 1941, to start paying rent despite the fact that appellant still made no demand for payment (see R. 278, 299, 301-2). He denied that the freezing order had anything to do with the decision, or even that it had been discussed (R. 300).

The funds in this bank account, including both the $300 rental collected by the appellant on the land purportedly given him and certain rentals collected by him on land in which his mother had a life estate

(R. 221-5), were used by the appellant for a variety of purposes. Out of these funds he paid his college expenses (R. 186), gave money to his sisters when they needed it (R. 189, 213), and at his father's instructions made a wedding gift of $500 to an employee of the Company (R. 190-192, 226-7). This gift would have been made out of funds of the corporation if they had not been frozen (R. 329). He also used the rental from the land purportedly given him by his father to meet his father's tax obligations. When in 1942 an additional tax liability of some $11,800 was asserted against his father, he met the major portion of it by borrowing $8000 from the corporation and giving a note for that amount to be repaid out of future rental payments (R. 244-6, 327-8). This was done at Tsuda's suggestion (R. 312).[5] The appellant further testified as follows (R. 190):

> Q. When your father told you he was giving you this land, he also told you that you would have to pay for your schooling?
> A. Yes.
> Q. Help your sisters?
> A. Yes.
> Q. Take care of his obligations?
> A. Yes.
> Q. Take care of your mother's obligations?
> A. Yes.

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[5]The remainder of the tax liability was met by the corporation, which purported to loan Yotaro Fujino $3,800 to be repaid out of two bank accounts owned by Yotaro Fujino (R. 277). The accounts were in the name of "Oahu Junk Company" and "Oahu Lumber & Hardware Company" (R. 277) and hence would seem to have been included in the properties transferred to the corporation by the indenture of December 2, 1940.

Q. All these things you said you have done, he told you you would have to do out of the land, is that correct?

A. Yes.

On December 3, 1943, the Alien Property Custodian, acting pursuant to the Trading With the Enemy Act, issued Vesting Order No. 2724 (R. 13). In that Order he described the six parcels of land in suit and found that Yotaro Fujino, a "national of a designated enemy country", was the beneficial owner of the described property. He further found that the appellant was "controlled by, or acting for or on behalf of" Yotaro Fujino and was therefore himself a "national of a designated enemy country" within the meaning of Executive Order No. 9095, as amended. Accordingly, he vested the property.[6] After filing a notice of claim with the Custodian (Complaint, para. 17, R. 9, 27), the appellant brought this suit.

The District Court, after trial, ordered the complaint dismissed. It held (R. 49-60) that the purported gift, even if genuinely intended, was ineffective because Yotaro Fujino's attorneys who executed the deed were not empowered to make a gift. It further held that Yotaro Fujino retained the control and beneficial use and enjoyment of the land. It further held that the appellant was a national of a designated enemy country (Japan) whose property could validly be vested under the Trading With the Enemy Act.

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[6]The Custodian has also vested the entire capital stock of the Oahu Junk Company as the property of nationals of a designated enemy country. Vesting Order No. 1756, 8 F.R. 10834, Vesting Order No. 7939, 12 F.R. 153.

SUMMARY OF ARGUMENT.

The District Court correctly held that as a matter of law the purported deed of gift on which the appellant bases his claim of title was wholly ineffective to transfer any interest in the property because its execution was not within the authority conferred upon the attorneys-in-fact who executed it. In view of the requirements of the Hawaiian recording statute and of the Statute of Frauds, the authority of the attorneys-in-fact must be found, if it can be found at all, within the written and recorded power of attorney of February 20, 1941. That power purports to be a grant of authority to conduct Yotaro Fujino's business affairs; it contains no express authority to execute a gift of property. In view of the unusual character of a grant of authority to execute a gift of the principal's property, the case is one peculiarly calling for application of the rules that formal powers of attorney are to be strictly construed and that where the instrument enumerates in detail the specific powers conferred, any general language which is used is to be construed in the light of those specific powers.

Even if the deed satisfied the formal requirements of Hawaiian law for effectuating a transfer of real property, however, the appellant cannot prevail. The evidence shows beyond question that the purported transfer of title was a formality only, which made no substantial change in the respective property rights of the parties. The findings of the District Court that the land continued to be beneficially owned by the father, that it continued to be controlled by the father,

and that the appellant, in his dealings with the land, acted for and in behalf of his father and was controlled by him are fully supported by the evidence. Those findings establish as a matter of law that the Custodian is entitled to retain the property. The Act, especially as amended in 1941 and as construed by the Supreme Court in *Clark v. Uebersee Finanz-Korporation,* 332 U. S. 480, is broad enough to permit the United States, in the exercise of its belligerant rights, to seize and retain all property which is beneficially owned or controlled by an enemy even if all the formalities had been satisfied and title had been purportedly placed in an innocent holder. Its purpose is to reach all "property interests which had an open or concealed enemy taint". 332 U. S. at 486.

There is no unconstitutionality in such an application of the Act. The concept of "enemy property" which may be seized and confiscated in time of war as an act of national self-protection and defense is not a rigid and inflexible one, and has never been thought to turn on the niceties of common law rules of title. The use of the test of enemy control is amply supported by precedents in the closely related field of prize law and by analogies drawn from other fields of law.

ARGUMENT.

I. THE PURPORTED DEED ON WHICH THE APPELLANT RELIES WAS INEFFECTIVE TO TRANSFER TITLE TO HIM.

Since the deed of March 21, 1941 was not executed by the purported grantor, Yotaro Fujino,[7] in person, the question of its effectiveness turns on the authority of Tsuda and Tsutsumi to execute it as his attorneys-in-fact. The Court below held that the power of attorney of February 20, 1941, which is recited in the deed as the sole source of their authority, did not authorize them to make a gift of land. Appellant seeks to escape that holding by contending that their authority was established by other evidence than the power of attorney. He asserts that "it is undisputed" that Yotaro Fujino had since 1935 intended making a gift of the land to appellant, and that the power of attorney of February 20, 1941 was given for that purpose (Appl's Br., pp. 11, 12). He also refers to testimony that in a letter which was not introduced in evidence and had not been read by the witnesses, Yotaro Fujino authorized the transfer of the land as a gift (Appl's Br., p. 17). We make no concession that it was ever Yotaro Fujino's intention to make a present gift of the land or to authorize his attorneys-

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[7]Mrs. Fujino was also named as a grantor, presumably to insure that any rights of dower were conveyed. Since she, too, is bound if at all only by the signature of Tsuda and Tsutsumi who purported to act under a power of attorney substantially similar to that given them by Yotaro Fujino, both parties and the court below have discussed the case as if Yotaro Fujino had been the sole grantor.

in-fact to do so. And we maintain that their authority must be found within the four corners of the recorded power of attorney of February 20, 1941, and that if it is not found in that document the deed must be held ineffective.

The law of Hawaii requires that

> All . . . powers of attorney for the transfer of real property within the Territory shall be recorded in the bureau of conveyances, in default of which no such instrument shall be binding to the detriment of third parties and conclusive upon their rights and interests. (Rev. L. of Haw., 1945, Ch. 308, Sec. 12757.)

This provision is worded very broadly and has been so interpreted. It extends its protection not merely to bona fide purchasers or lien-holding creditors, as do most recording statutes, but to all "third parties". The Supreme Court of Hawaii has declared that an unrecorded or improperly recorded power of attorney or other instrument which the statute requires to be recorded "must be regarded as a nullity," *Lalakea v. Hilo Sugar Co.,* 15 Hawaii 570, 576, and that "recording was essential to validity," *id.; Holmes v. Serrao,* 18 Hawaii 25, 26. While recognizing that the failure to record cannot be availed of by "mere trespassers or strangers" *Holmes v. Serrao, supra,* it has held that a conveyance made pursuant to an unrecorded power of attorney is invalid even against a subsequent transferee who had actual knowledge of the existence of the power and thus could not be deemed to have

been injured by the failure to record it. *Holmes v. Serrao, supra.*[8]

We think the Court below rightly held that the Alien Property Custodian was entitled to the benefits of the recording statute. He is surely a "third party" in the ordinary sense of the word. He is not a trespasser, for he holds the land pursuant to an Act of Congress authorizing him to seize and retain all enemy property. For some purposes at least his position may even be better than that of the "ordinary assignee for value". *Standard Oil Co. v. Clark,* 163 F. (2d) 917, 932 (CCA 2), cert. den. 68 Sup. Ct. 901. He holds vested property, not for the benefit of the enemy former owner, but for the benefit of the United States and the American people as a whole. Vested property is by statute required to be administered "in the interest of and for the benefit of the United States". Trading With the Enemy Act, Section 5(b), 55 Stat. 838, 50 U.S.C. App., Sec. 5(b). In particular, the statute explicitly directs the Custodian to hold the property for the benefit of American creditors and to pay the claims of such creditors according to prin-

[8]The decision in *Wright v. Brown,* 11 Hawaii 401, on which appellant relies heavily (Appl's Br., 21-3), lends him little support. That case did not hold that an unrecorded transfer is good against a marshal on a levy of execution in a creditor's suit. The decision rested rather on the fact that the party seeking to attack an unrecorded chattel mortgage had introduced no evidence to show the basis of his claim to the property. The court said:

> It does not appear under what claim or in what capacity the defendant held the chattels. He was and is the Marshal and we understand outside the record that he held the goods on execution against the property of Cross [the mortgagor], but for the purposes of this case he is to be considered a mere stranger or trespasser. (11 Hawaii at 403.)

ciples analogous to those applied in bankruptcy. Trading With the Enemy Act, Sec. 34, 60 Stat. 925, 50 U.S.C. App., Sec. 34. Hence, we think he should be in a position comparable to that of a trustee in bankruptcy, who is almost invariably allowed to disregard unrecorded transfers. Bankruptcy Act, Sec. 70, 11 U.S.C., Sec. 110; Collier, Bankruptcy (14th Ed., 1942), Sec. 70.

Even if we should be wrong as to this, however, the appellant is faced also with the requirements of the Statute of Frauds. As enacted in Hawaii, that statute requires that any contract for the sale of land must be evidenced by a writing "signed by the party to be charged therewith, or by some person thereunto by him *in wirting duly authorized.*" Rev. Laws of Hawaii, 1945, Ch. 166, Sec. 8721. (Emphasis added.) This provision has been held to prevent any "verbal transfer of real estate without writing" and hence to preclude the establishment of a gift of land by parol. *Mokuai v. Kapuniai,* 6 Hawaii 160. Under this provision the deed of March 21, 1941, is effective as a writing to bind Yotaro Fujino only if the authority of those who signed as purported attorneys-in-fact is found in writing. And under such a provision it is settled that the written authority relied upon must be strictly complied with and that parol evidence of the principal's intention or of his acquiescence in what was done cannot enlarge the terms of the written authority. See e.g., *Kozel v. Dearlove,* 144 Ill. 23, 32 N. E. 542; *Stetson v. Patten,* 2 Maine

358; *Chick v. Bridges,* 56 Ore. 1, 107 Pac. 478; *In re Springer's Estate,* 97 Wash. 546, 166 Pac. 1134.

We turn therefore to the text of power of attorney of February 20, 1940, which was the only written authorization produced at the trial. The character of that instrument (R. 479-82) is shown by its opening phrase which grants the authority "to carry on and transact all my business in the Territory of Hawaii." The subsequent grants of authority all relate to the conduct of ordinary business transactions. Although the instrument enumerates in detail and at length a wide variety of specific powers necessary and appropriate to the conduct of ordinary business affairs, it nowhere purports to confer the authority to make a gift of land or other property. As the Court below said (R. 56), the power of attorney

> must be read as a whole, and thus read it is a grant of—as it says—full and adequate power "to carry on and transact all my business in the Territory of Hawaii." A gift is not a business transaction.

It is true that, in the midst of numerous specific grants of authority to conduct business transactions the instrument contains general phrases conferring the powers to "otherwise dispose of" real property and "to remise, release and quitclaim" interests in property. We think the Court below was clearly correct in holding that these were mere "catch-all" phrases (R. 56) to be construed in the light of the specific powers which they accompany and that they

are insufficient to confer by their generality the highly unusual power to make a gift of land.

It must be remembered that we are dealing here with a transfer of land by means of documents to which the law attaches a high degree of formality. The Supreme Court of Hawaii has declared of powers of attorneys generally that

> Formal letters of attorney are subject to a strict construction and are never interpreted to authorize acts not obviously within the scope of the particular matter to which they refer. General language when used in connection with a particular subject matter will be presumed to be used in subordination to that matter. *Lopez v. Soy Young,* 9 Hawaii 113, 115. (See also *Hawaiian Agricultural Co. v. Norris,* 12 Hawaii 229.)

These statements are in accordance with the general rule in the United States. See e.g., *Lanahan v. Clark Car Co.,* 11 Fed. (2d) 820 (C.C.A. 3); *Lindenberger Cold Stor. & C. Co. v. J. Lindenberger,* 235 Fed. 542, 570-571 (W. D. Wash.); *In re Springer's Estate,* 97 Wash. 546, 166 Pac. 1134; *Brown v. Laird,* 134 Ore. 150, 291 Pac. 352; Mechem, Agency (2nd Ed., 1914), Sec. 784.[9] There is a particular reason to apply these rules to an assertion of the power to make a gift of the principal's property. Such a power is so unusual, and so remote from the ordinary functions of an

[9]Here, moreover, the power was drawn by, or for, the attorney-in-fact and submitted to the principal for signature. "If there are ambiguities in the power of attorney, they are to be resolved against the draftsman." *In Re Manufacturing Lumbermen's Underwriters,* 18 F. Supp. 114, 122 (W.D. Mo.).

agent, as to warrant the requirement it can be conferred only by the clearest and most explicit language and that it will not be implied from a general power to sell, mortgage and otherwise dispose of the land. See *Kaaukai v. Anahu,* 30 Hawaii 226, 227. See also *Hathaway v. McGillycuddy,* 56 Cal. App. 689, 206 Pac. 108; *Bertelson v. Bertelson,* 49 Cal. App. (2d) 479, 122 P. (2d) 130; *Brown v. Laird,* 134 Ore. 150, 291 Pac. 352; *Huntsman v. Huntsman,* 56 Utah 609, 192 Pac. 368; Mechem, Agency (2nd Ed.) 1914, Sec. 818; 73 A.L.R. 884 and cases cited. Measured by these standards the power of attorney of February 20, 1941, does not support the appellant's claim. Accordingly, the deed was wholly ineffective to confer any right on the appellant.

II. EVEN IF THE APPELLANT ACQUIRED FORMAL TITLE, THE LAND WAS AT ALL TIMES PROPERTY CONTROLLED AND BENEFICIALLY OWNED BY AN ENEMY NATIONAL WHICH THE CUSTODIAN WAS ENTITLED TO VEST AND RETAIN.

A. The District Court's findings that the land was controlled and beneficially owned by an enemy national were fully supported by the evidence and should be affirmed.

Even if the formalities necessary to convey title to land were satisfied, however, the appellant may not recover. He must also establish that the transfer was genuine and resulted in a complete severance of his father's ownership and control of the land. On this issue, as on all issues at the trial, the burden of proof was on the appellant to establish the interest to which he was entitled. Trading with the Enemy Act, Sec. 9(a); *Thorsch v. Miller,* 5 F. (2d) 118

(App. D. C.); *Sturchler v. Hicks,* 17 F. (2d) 321 (E.D.N.Y.). The District Court has found as a fact that

> Although record title to the six parcels of land stood in plaintiff's name, he did not have or purport to exercise complete and absolute ownership of the property. Notwithstanding the deed, plaintiff's father, the grantor, has, through his attorneys in fact and personally, retained control and the beneficial ownership of the land. In holding the record title to the land, plaintiff has acted for and in behalf of his father and has been controlled by him. (Fdg. 15, R. 54-5.)

A major part of the appellant's argument is devoted to an attack upon that finding and various subsidiary findings. The attack on the findings seems to disregard the salutary principle, embodied in Rule 52(a) of the Federal Rules of Civil Procedure and consistently adhered to by this Court, that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial Court to judge of the credibility of the witnesses." See *Hartford Accident & Indemnity Co. v. Jasper,* 144 F. (2d) 266, 267 (C.C.A. 9), and cases cited. This principle is particularly applicable in a case where almost the entire evidence consisted of testimony in open Court and where the crucial issue of continuing control by Yotaro Fujino turned in considerable part on the state of mind of the appellant and of other witnesses. As this Court has said:

> Where the witnesses appeared in court in person we are bound to respect the determination [of the trial court] as to questions of fact. *(Neil v. Gross,* 101 F. (2d) 153, 155 (C.C.A. 9.)

We think the findings here, far from being "clearly erroneous", are amply supported by the evidence. True, there is no unequivocal testimony of any witness that the transactions of 1940-1941 were without any real effect on Yotaro Fujino's continued control and enjoyment of his Hawaii properties, including both his business and the land on which it was located. Such an admission could hardly be expected. Parties who in contemplation of war seek to create a false appearance of non-enemy ownership seldom leave a clear trail of direct admission. The only significant witnesses at the trial were the appellant himself, Tsuda and Tsutsumi, his father's attorneys-in-fact and trusted agents, and Murakami, his father's counsel who had arranged the legal formalities of the transfers, all of whom could be presumed to be favorable to the appellant's position in this litigation. Moreover, most of the letters received from Yotaro Fujino during 1940-1941 were destroyed immediately after Pearl Harbor, so that there was a very sparse record of contemporaneous statement to show how the parties then regarded their relationships. Despite the inherent unlikelihood in such circumstances of finding a confession that the purported transfer of ownership was sham, the record is, we submit, more than adequate to support the District Court's finding. It shows beyond question that the dispositions of his Hawaii properties purportedly made by Yotaro Fujino in 1940 and 1941 had no real effect on his continued control and enjoyment of those properties, and that after as well as before those transactions he remained the real owner.

Prior to November 1940, Yotaro Fujino was without dispute the owner of a valuable business and of six parcels of land, the principal importance of which was a site for the business. Since 1935, these properties had been managed for him by Tsuda and Tsutsumi as his attorneys-in-fact, subject to his written instructions. In what way did his position differ after March, 1941?

(1) *Control of the business.*—Nominally the ownership of the business was divided up among members of Yotaro Fujino's family so that a majority of the shares was in the name of the three children resident in Hawaii. Actually, this was a paper transaction only. No money or other consideration was paid by the children. Shares were issued, notes given for the assumed value of the shares, and the shares pledged as security for the notes. The avowed purpose of the pledges was to enable Yotaro Fujino to retain "parental control". There is nothing in the record to suggest that it was ever contemplated that the appellant or his sisters would pay off the notes and redeem the pledges. So far as appears, none of them would have been financially able to do so even had they so desired. The appellant evidently had no property and no source of income at the time of the incorporation.[10] The sisters were married to subordinate employees of

[10]While the land was formally to be transferred to him, it was certainly not contemplated that he should sell the land in order to pay off the notes, and there was no suggestion until August, 1941, that he should derive any appreciable income from the land. In any event, an income of $300 a month out of which he had to pay his college expenses and look after various obligations of his father would hardly permit the appellant to save enough to pay off a $20,000 indebtedness at any foreseeable future time.

the corporation and it was evidently necessary for the appellant at various times to give them money. Although the appellant was living with his father, both when plans for the incorporation were discussed with Murakami and when the corporation was actually set up, those plans were merely "casually" mentioned to him (R. 149). He was never consulted by his father as to his willingness to assume an obligation in the amount of $20,000 or as to the fairness of the valuation which his father placed on the shares; his father merely "told me he was make me sign the notes" (R. 230).[11] There is likewise nothing to suggest that his sisters were consulted, and, indeed, the testimony is entirely to the effect that the incorporation was car-

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[11]The way in which the appellant was regarded is illustrated by the following excerpt from his testimony on cross examination:

Q. You knew that you had had 200 shares of stock issued to you—or did you know that?

A. Yes, I recall his saying that to me.

Q. You recall that?

A. Yes.

Q. Did you talk much about it with your father?

A. Oh, not to go into the details.

Q. He just said to you: "I have issued 200 shares of stock to you?"

A. Yes.

Q. And I believe you testified the other day he said: "You have not proven yourself yet, so I am going to have you give me a note for twenty thousand dollars for that stock?"

A. Yes.

Q. Is that right?

A. Yes.

Q. Did he say anything more about that stock?

A. No, that is about all.

Q. He just announced that to you; he said, "I have issued 200 shares of stock. You haven't proven yourself, and so you have got to pay me under this note twenty thousand dollars," or you gave him a note for twenty thousand dollars for the stock?

A. Yes; he knew I was going to school; he told me I was to study hard. (R. 177-8).

ried out wholly by Tsuda, Tsutsumi and Murakami, pursuant to instructions from Yotaro Fujino, and that all concerned took it for granted that appropriate notes and pledges would be forthcoming without question.

After the incorporation the conduct of the business remained unchanged. The routine management continued to be in the hands of Tsuda and Tsutsumi as it had been between 1935 and 1940. Yotaro Fujino continued to send "instructions" which Tsuda and Tsutsumi "would try to carry out as carefully and completely as [they] could" (R. 321). On the other hand, appellant, although elected President on his father's instructions, "had nothing to do with the management of the business at all" (R. 185), and disclaimed any pretense of ability to exercise business judgment about the affairs of the Company. For instance at the trial, when asked whether the Company could do business if they did not have the land here in suit, he replied "well, I don't have that much business mind, to be definite" (R. 189). He apparently deferred to Tsuda and Tsutsumi on everything, regarding them as "much more mature than me" (R. 212). He conceived it his duty simply to obey his father's injunction to which he repeatedly referred in his testimony, "to study hard and . . . after I go to school, help in that store" (R. 180; see R. 151, 176, 178, 229). There is nothing in the record to suggest that either of the appellant's sisters exercised any more active voice in the affairs of the corporation.

Thus the purported ownership of the stock by the children meant nothing in terms of the control of the business. Nor did it have any significance in connection with any of the other attributes of ownership. The children could not sell the shares because they were pledged to their father. Apparently no dividends were ever paid on the shares.[12] For all practical purposes the incorporation was a mere paper transaction without any real significance except as an attempt to avoid seizure of the entire interest in the corporation in the event of war between the United States and Japan.

(2) *Control of the land.*—There is no reason to believe that the purported transfer of the land was any more real. The two transactions were necessarily linked together. The land was important only as a site for the business, to which it was indispensable. The two transfers were discussed together in the summer of 1941 and were later carried out as essentially one transaction. Both were motivated by Yotaro Fujino's concern with the "strained relationship between the United States and Japan" (R. 117-118). Moreover, the only motive attributed to Yotaro Fujino in making the transfer is wholly consistent with a retention by him of all the benefits of ownership. Appellant's witness testified that his objectives were to prevent the passage of land to collateral heirs

[12]Although the appellant's witnesses were examined in some detail concerning the appellant's income and his disposition of it, there was no suggestion that he derived any income from dividends on his shares in the corporation. It affirmatively appears that no dividends were paid Yotaro Fujino (R. 206, 275).

on his death and to avoid payment of estate taxes. There is no suggestion that he wished appellant to exercise any present dominion over the land or to enjoy any present benefit from it.

It is unnecessary, however, to rely on assumption, for the actual treatment of the land by the parties shows that the formality of title in the appellant was disregarded. For example, just before the deed to appellant was executed, Tsuda and Tsutsumi, as attorneys-in-fact for Yotaro Fujino, mortgaged the land for $15,000 (over half of its declared value). The mortgage was to secure an indebtedness which had several months earlier been assumed by the new corporation. Moreover, Tsuda and Tsutsumi purported, at the time of the mortgage, to have been under instructions to transfer the land to the appellant. Apparently, however, Tsuda and Tsutsumi took the realistic view, ignoring the formalities both of the incorporation and the deed of gift which was about to be executed. They mortgaged Yotaro's land which he was about to "give" to his son for an indebtedness which was neither appellant's nor Yotaro's, but the corporation's. The appellant apparently shared the same view, for although he claims to have been informed some months before of his father's intention to give him the entire land, he made no objection and expressed no surprise when he learned of the mortgage.

The dealings with the land after execution of the deed confirm this conclusion. It was assumed by all

that the land would continue to be available to the corporation. No rental was paid until August, 1941, shortly after the freezing controls became applicable to Yotaro Fujino, his wife and the corporation. The suggestion to pay rent came from Tsuda and Tsutsumi and the rental paid by them was accepted without question by the appellant.[13] When the final payment was made they instructed appellant to start a bank account with the rental payments.[13a] Although they denied that this action was taken because of the application of the freezing regulations to Japanese property, the inference that it was done for that purpose is unavoidable.

These rental payments were used to pay the appellant's college and general living expenses, which presumably, his father would otherwise have paid. In addition, appellant used these funds to make gifts to his sisters which his father would otherwise have made and, on his father's instructions, to give $500 to an employee of the corporation—a gift which the corporation would have made but for the freezing regulations. Finally, the appellant helped pay his father's income tax by borrowing $8000 from the cor-

[13]Although Tsuda testified that the rental was set "sometime right after Kaname got back to the Territory" (R. 277), he gave no satisfactory explanation of the failure to pay rental until August. The inference is legitimate that no discussions as to rental were had until the impact of the freezing controls made such action appear desirable.

[13a]Since the appellant was an American citizen a bank account in his name would not be likely to be frozen, and the account which he set up was not frozen.

poration to be repaid out of the $300 rental payments.[14]

In all these transactions the appellant appears to have been completely passive, doing whatever Tsuda or Tsutsumi told him to. He left in force the power of attorney which he had given Tsuda and Tsutsumi although he understood that power as giving them the power at any time to deed away the land purportedly conveyed to him (R. 255). He made no protest at the mortgaging of the land, contrary to his father's asserted intention to give it to him outright. At Tsuda and Tsutsumi's instructions he even endorsed the note for the mortgage indebtedness so as to become personally liable for the Company's debt. He made no suggestion that he should be paid rent and did not bargain with respect to the "somewhat cheap rental." He obeyed without question his father's telegraphic instructions to pay $500 to an employee. He followed Tsuda and Tsutsumi's "suggestion" in meeting his father's income tax liability. He testified that when his father said he was giving him the land he told him he "would have to" take care of his parents' obligations "out of the land." He testified that he corresponded with his father about these various transactions and acted upon his

[14]The minutes of the corporation report that this $8,000 was credited against appellant's note of $20,000 to his father (Pltf. Exh. P., R. 526). Since the whole issue of the stock for notes and pledges was a mere paper transaction, this further paper credit, if made, was hardly significant. What was significant was that rental payments from that time on were applied to the repayment of appellant's loan so that appellant ceased to obtain any practical benefit from his ownership of the land.

advice and instructions (R. 192). He testified that he was "guided entirely" by what Tsuda and Tsutsumi told him he should do (R. 211). In all this he drew no distinction between the land and the business; thus when asked about the amount and nature of the mortgage on the land purportedly transferred to him he said "well, the details I wouldn't know because Mr. Tsuda and Tsutsumi did the actual running of the business. I only knew there was a mortgage" (R. 155). The entire record reveals him as a young man who, although legally of age, was concerned solely with obeying his father's injunction to "study hard" and who in all of his property transactions deferred completely to his father's wishes or to the "advice" of his father's attorneys-in-fact. Directly, or through his trusted agents, Yotaro Fujino had as complete control over the land and its use as he had had before the purported gift. It is hard to imagine that after the incorporation and the purported gift Yotaro Fujino felt himself the poorer or, if he did, that such a feeling had any rational foundation in fact. Cf. *Helvering v. Clifford,* 309 U. S. 331, 336.

The appellant has argued that the payments which he made out of the rentals received were all made of his own free will because of his independent desire to meet family obligations which his father was unable to meet, and that the mere fact that his wishes conformed with his father's fails to show control (Appl's Br., pp. 29-33). It is true that on direct examination the appellant testified that he made no

agreement to hold the land for his father and that he used the income from it as his own (R. 158). But the weight to be given that testimony was for the trial court to determine. The question whether appellant was a free agent whose wishes happened to coincide with those of his father or a strawman who would automatically comply with any instruction of his father or his father's agents was a question of fact to be determined by the trial Court on the basis not only of the testimony, but also of the observed demeanor of the appellant and the attorneys-in-fact on the witness stand. We have shown that there was ample evidence to support the Court's finding that "the management of the business and the real estate was left entirely to the attorneys-in-fact, and plaintiff with regard to each did what he was advised to do by his father's attorneys-in-fact" (Fdg. 14, R. 54). The appellant's argument is thus simply a request that this Court, on the basis of the cold record only, substitute its judgment as to the weight of the evidence for that of the trial judge who saw and heard the witnesses.

B. On such findings the Custodian is entitled as a matter of law to retain the vested property.

It is clear that in a suit under Section 9(a) of the Trading with the Enemy Act—the location of formal title is not controlling. The Custodian is empowered to seize and retain property which is beneficially owned by an enemy even though formal title may be

in non-enemy hands.[15] Thus in *Stoehr v. Wallace,* 255 U. S. 239, the Court denied relief in a suit under Section 9(a) brought by the holder of record title to the property sued for, because it found that the "beneficial ownership" (255 U. S. at 251) remained in an enemy. The decision of the District Court, 269 Fed. 827, 835 (S.D.N.Y.), which the Supreme Court affirmed, makes it abundantly plain that a holder of bare legal title has no rights against the Custodian. Similarly, in *Standard Oil Co. v. Clark,* 163 F. 2d 917 (C.C.A. 2), cert. den. 68 Sup. Ct. 901, the Court denied recovery to the holder of record title on the ground that formal transfers of title by an enemy to the plaintiff had "made no substantial change in the relative property interests of the parties" (163 F. 2d at 923). See also *Kind v. Clark,* 161 F. 2d 36 (C.C.A. 2), cert. den. 68 Sup. Ct. 108; *Hodgskin v. U. S.,* 279 Fed. 85 (C.C.A. 2).

These well-settled principles require affirmance of the decision below. The District Court's finding that Yotaro Fujino, an enemy, retained the "beneficial ownership" of the land is, as we have shown, amply supported by the evidence. Both the incorporation and the purported land transfer were clearly sham transactions which were often ignored by the parties in their dealings with the property and which were without any practical significance. Even though sham

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[15]Cf. Section 7(c) of the Act, 40 Stat. 411, 50 U.S.C. App. Sec. 7(c) which authorizes the Custodian to seize not only property "belonging to" an enemy but also property "held . . . on behalf of or for the benefit of" an enemy.

character was not "disclosed by direct evidence or confession", *Standard Oil Co. (N.J.) v. Clark, supra,* 923, the trial Court was at liberty to disregard the self-serving statements of appellant's witnesses. The cases cited at pp. 24-5 of appellant's brief do not require a contrary conclusion. Each of those cases rests on its own facts, and in none, so far as the reports reveal, was there such a showing of day-to-day action inconsistent with the hypothesis of real ownership in the claimant and consistent only with control and beneficial ownership in an enemy as is here present. In any event, the question here is not whether different findings could have been made on the present record, but whether the findings that were made can be set aside as "clearly erroneous."

The District Court's further findings that Yotaro Fujino retained "control" of the land and that appellant, in his actions relating to the land, "acted for and in behalf of his father and has been controlled by him" afford additional grounds for affirmance of the decision below. By the First War Powers Act, 1941, 55 Stat. 838, 50 U.S.C. App. Sec. 5(b), Congress amended Section 5(b) of the Trading with the Enemy Act to give "a broader grant of authority to the Executive", *Markham v. Cabell,* 326 U.S. 404, 411. As amended, Section 5(b) conferred the power to vest "any property or interest of any foreign country or national thereof." The term "national" had been used in amendments made to the Act by the Joint Resolution of May 7, 1940, 54 Stat. 179. When the First War Powers Act, 1941, was enacted the term

had acquired a well-established meaning. It had been defined by the President (Executive Order No. 8389, April 10, 1940, 5 F. R. 1400, as amended by Executive Order No. 8785, June 14, 1941, 6 F.R. 2897), and that definition had twice been ratified by Congress (Joint Resolution of May 7, 1940, *supra;* First War Powers Act, 1941, *supra,* Sec. 302).

As thus defined a "national" of any country includes any business enterprise "owned or controlled by" one or more nationals of that country and "any person to the extent that such person is, or has been . . . acting or purporting to act directly or indirectly for the benefit or on behalf of" a national of that country (Executive Order No. 8389, as amended, Sec. 5(E)). This definition has been adopted as a criterion for the exercise of the vesting power. By Executive Order No. 9193, July 6, 1942, 7 F.R. 5205, so far as here relevant, the President authorized the Custodian to vest property "owned or controlled by . . . [or] held on behalf of or on account of" a "national" of a "designated enemy country" (Sec. 2(c)). He designated Japan as an enemy country and declared that the term "national" should, with an exception not here relevant[16] have the meaning prescribed in Executive Order No. 8389, as amended (Sec. 10).

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[16]The exception is that persons not within the designated enemy country are not to be regarded as nationals of such country for purposes of the Order unless at least one of three specified findings is made. Among the requisite findings are a finding either that the person is "controlled by or acting for or on behalf of" a person within the enemy country or that the national interest requires that such person be treated as a national of a designated enemy country. Both findings were made in the Vesting Order in this case. (R. 15-16.)

As a consequence of the 1941 amendments to the Trading with the Enemy Act the Custodian is empowered to vest property which is "controlled" by an enemy or which is owned by a person "acting for the benefit of or on behalf of" an enemy. In both of these categories the ultimate criterion of vestibility is enemy control, whether that control is looked at as being exercised directly on the property or on the person holding the property.

The significance of enemy control in the amended act is clearly established by the decision of the Supreme Court in *Clark v. Uebersee Finanz-Korporation,* 332 U. S. 480. In that case the Court held that a Swiss corporation was not barred from recovering vested property by the mere fact of its incorporation in Switzerland in the absence of any allegation that it was subject to enemy influence or taint. In so holding, however, the Court pointed out that the 1941 amendments had sought to cure the "rigidity and inflexibility" of the 1917 Act (p. 484). It said (pp. 484-5) that "it was notorious that Germany and her allies had developed numerous techniques for concealing enemy ownership *or control* of property which was ostensibly friendly or neutral. They had through *numerous devices, including the corporation,* acquired *indirect control or ownership* in industries in this country for the purposes of economic warfare. Sec. 5(b) was amended on the heels of the declaration of war to cope with that problem." (Emphasis added.) Accordingly, it declared that the amendment was designed "to reach enemy interests which masqueraded

under . . . innocent fronts" (p. 485) and to give the President " 'flexible powers' . . . to deal effectively with property interests which had an open or concealed enemy taint" (pp. 485-6).

To illustrate the significance of the changes made by the 1941 amendments, the Court referred to the case of property in the United States owned by a foreign corporation which in turn was enemy owned. In *Behn, Meyer & Co. v. Miller,* 266 U.S. 457, a case growing out of World War I, the Court, adhering strictly to corporate formalities, had held that such property was not enemy-owned and must be returned. In the *Uebersee* case the Court declared that the *Behn, Meyer* decision was inapplicable under the amended Act, saying that to apply it would "run counter to the policy of the Act and be disruptive of its purpose" (p. 488). Accordingly, the Court declared, the definition of enemy contained in Section 2 of the Act must be "harmonized with the policy underlying § 5(b) and § 9(a) of the amended Act." (p. 488).

The present case presents a question analogous to that involved in the *Behn, Meyer* case. Here, as there, property in the United States, although nominally held by an innocent holder, has been found to be controlled in fact by an enemy resident in enemy territory. The question is whether the United States can vest and retain it as enemy property by virtue of that control or whether it is immunized from seizure by the fact that formal title has been placed in an American citizen. In view of the 1941 amendments and the

Uebersee decision, we think there can be no question of the right of the United States to the property. The application of the Act can be "harmonized with the policy underlying § 5(b) and § 9(a) of the amended Act"—i.e., the policy of reaching all "enemy interests which masqueraded under . . . innocent fronts"—only by holding that all property which as a matter of economic reality is enemy controlled may be vested and retained.

There can be no doubt that enemy "control" in the sense used by the Court in the *Uebersee* case existed here. Yotaro Fujino is an enemy in the strictest sense of the word. His control of the land rested both on his legal powers and on the practical actions and understandings of the parties. In the unlikely event that conflict had arisen between Yotaro Fujino and the appellant as to the use of the land, Yotaro Fujino had ample means of compelling obedience. The appellant's hope eventually to step into his father's shoes in the business—a hope to which, the testimony shows unequivocally, he attached far more importance than to any rights to the land—could have been destroyed if he had incurred his father's displeasure. Indeed, his father could at any time have demanded payment of the note for $20,000, and could thereupon have retaken the stock which had been issued in the appellant's name since that stock was held as security for the "loan". The appellant's title to the land, if he had any, was also dependent on the good will of his father and his father's agents. The appellant was plainly in no position to pay off within one year, according to

its terms, the $15,000 note which he had endorsed and as security for which the land had been mortgaged. If his father's agents, as managers of the corporation which his father controlled, had failed to pay off the note the mortgage would have been foreclosed and the land sold.

Of course, none of the foregoing steps was taken or anticipated. They were unnecessary. It would not have occurred to the appellant to do anything contrary to his father's wishes. He was content to leave the use of the land with the corporation, to accept as his principal source of income whatever payments his father's agents decided to make him, to remain dependent on those payments and certain other income owned by his mother for his current revenue, to obey implicitly his father's instructions as to the disposition of the money he received, and to defer in everything to the decision of his father's agents. In other contexts the Courts have recognized that "under some circumstances 'controlling influence may spring as readily from advice constantly sought as from command arbitrarily imposed.'" *American Gas & Electric Co. v. Securities and Exchange Commission,* 134 F. (2d) 633, 642 (App. D.C.), cert. den., 319 U.S. 763. For purposes of the Public Utility Holding Company Act "control" and "controlling influence" have been held to "include the power to control and the power to exert a controlling influence as well as the actual exercise of such power." *Public Service Corporation v. Securities and Exchange Commission,* 129 F. (2d) 899, 903 (C.C.A. 3); *Detroit Edison Co. v. Securities*

and Exchange Commission, 119 F. (2d) 730, 739 (C.C.A. 6) cert. den. 314 U.S. 618. The record here shows more than the mere seeking of advice or the existence of latent powers. We have here direct admissions by the appellant that he sought at all times to carry out his father's "instructions" and that he did whatever his father's attorneys-in-fact told him to do.

The Supreme Court has emphasized that questions of control turn upon "actualities" not on any "artificial test" and are issues "of fact to be determined by the special circumstances of each case". *Rochester Telephone Corporation v. United States,* 307 U.S. 125, 145. It is clearly in that sense that the term "control" is used in the *Uebersee* case. As the Court emphasized, the purpose of the Trading with the Enemy Act is to "reach enemy interests which masqueraded under . . . innocent fronts" (332 U.S. at 485) and to insure that "no innocent appearing device would become a Trojan horse" (332 U.S. at 488). That purpose would be defeated if the only forms of control which were judicially recognized were those resting on legally enforceable undertakings unequivocably expressed which left no significant rights in the ostensibly innocent holder. As a practical matter, control exercised by placing property in the hands of a child who is dependent on the parent's good will for both his present and future economic wellbeing, and who has shown by past experience that he can be relied upon to obey parental instructions unquestionably, may well be far more effective than a control

expressed in formal agreements arrived at between parties dealing at arm's length. To hold that only property in which the enemy retained formal legal rights of ownership is subject to the Act would be to hold that only obvious and avowed cloaking devices could be thwarted while subtler and often more effective techniques of achieving the same result would be unchecked.

In the *Uebersee* case the Court did not pass on the question whether one who is a "national" of an enemy country by reason of action for the benefit of or on behalf of a national of such country could recover vested property. The Court did hold that a "national" of a *foreign* country might recover vested property if he had no "enemy taint." It did so on the ground that it would not without very strong proof attribute to Congress an intention to cut off the rights of "friendly or neutral foreign interests" (332 U.S. at 487). In doing so, however, the Court also declared that the definitions of "enemy" contained in Section 2 of the Act must now be regarded as "merely illustrative, not exclusionary" (322 U.S. at 488-9) and that the "concept of enemy" must be "given a scope which helps the amendment of 1941 fulfill its mission" (332 U.S. at 489). The Court did not attempt to define the new scope to be given to the concept of enemy, saying that that definition "must await legislative or judicial clarification" (332 U.S. at 490).

We submit that in defining the new concept of enemy, the executive definition of "national of a designated enemy country" which has underlain the

administration of the Trading with the Enemy Act throughout this war and which has received implicit approval by the Congress should serve as the appropriate model. Nothing in the *Uebersee* decision can be construed as a rejection of that definition; on the contrary, the Court's description of the Act as conferring on the President "new 'flexible powers' . . . to deal effectively with property interests which had either an open or concealed enemy taint" indicates that the definition of enemy national which the President found necessary to deal effectively with property interests having an enemy taint should be deemed the controlling definition.

The appellant clearly comes within that definition. On the evidence and the findings of the District Court, there can be no doubt that the appellant, in his dealings with the land and the income from it, acted "directly or indirectly for the benefit of or on behalf of" Yotaro Fujino, a national of Japan and an enemy. Accordingly, he is to be regarded as coming himself within the new concept of enemy to which the Court referred in the *Uebersee* case and as disqualified for that reason from recovering the land. This does not mean that he is an enemy for all purposes. Under the definition in the executive orders appellant is a national of a designated enemy country only "to the extent that" he has acted for the benefit of an enemy. As to property in respect of which he did not so act, he does not come within the definition. But in his dealings with the land he unquestionably did act in his father's interest and for his father's benefit and,

accordingly, to the extent of his interest in the land he is to be regarded as himself an enemy who is disqualified from recovering the land.

C. The Trading with the Enemy Act as so construed impairs no constitutional right of the appellant.

The appellant's final contention is that the Act, if construed to empower the Custodian to retain property which was controlled by Yotaro Fujino would deny him constitutional rights under the Fifth Amendment. He argues that a citizen of the United States, even though controlled by and acting in the interest and for the benefit of an enemy cannot be regarded as himself an enemy to the extent of such action (App. Br., pp. 45-7). And he argues that if Yotaro Fujino's control over the property amounted to anything short of complete dominion, then there must be some interest remaining in the appellant which could not constitutionally be taken. Because of the presence of such an interest, he insists, the entire property must now be returned (App. Br., pp. 43-5).

The appellant's arguments would remove from the Act the concept of control as a basis for vesting. To say that if "anything less than complete dominion" is shown the property must be returned is to say that it must be returned unless it is enemy owned. "Complete dominion" is the equivalent of ownership. We think that such complete dominion by an enemy was here shown, but we think it was not necessary to show it. The law has frequently recognized and acted on the basis of a control which falls far short of complete

dominion. In tax cases the Courts have repeatedly applied the rule that "transactions, which do not vary control or change the flow of economic benefits, are to be dismissed from consideration." *Higgins v. Smith,* 308 U.S. 473, 476. They have gone father than it is necessary to go here in disregarding "technical considerations, niceties of the law of trusts or conveyances, or the legal paraphernalia which inventive genius may construct as a refuge from surtaxes." *Helvering v. Clifford,* 309 U.S. 331, 334. They have held that "the power to dispose of income is the equivalent of ownership of it." *Helvering v. Horst,* 311 U.S. 112, 118. They have disregarded trusts, which although irrevocable, merely resulted in a "temporary reallocation of income within an intimate family group." *Helvering v. Clifford, supra,* 335. They have reached this result although the grantor has permanently deprived himself of the legal right to demand the corpus or any of its income and even though the members of the family group for whose support he was providing were of age so that the grantor was under no legal obligation to provide for their support. *Commissioner v. Buck,* 120 F. (2d) 775 (C.C.A. 2); *Littel v. Commissioner,* 154 F. (2d) 922 (C.C.A. 2) and cases cited. The test has been whether the parent, despite the trust, continued to "control the family purse strings." *Gaylord v. Commissioner,* 153 F. (2d) 408, 413 (C.C.A. 9). Similarly, the courts have disregarded the establishment of family partnerships where no real contribution of capital or essential services was made by the spouse

or child. *Commissioner v. Tower,* 327 U.S. 280; *Lusthaus v. Commissioner,* 327 U.S. 293; *Losh v. Commissioner,* 145 F. (2d) 456 (C.C.A. 10); *Grant v. Commissioner,* 150 F. (2d) 915 (C.C.A. 10).[17]

The law of prize, to which the Trading with the Enemy Act is historically and constitutionally related,[18] furnishes an even closer analogy. Courts of prize have often declared that the right of the sovereign to seize and retain property as enemy in character does not turn on satisfaction of common law rules as to passage of title.[19] In particular, they have repeatedly disregarded transfers of title to vessels where the former owner or his agent remained in control of the vessel. *The Andromeda,* 2 Wall. 481, 489; *The Benito Estenger,* 176 U.S. 568; *The Jemmy,* 4 C. Rob. 31, 165 Eng. Rep. 565; *The Sechs Geschwistern,* 4 C. Rob. 100, 165 Eng. Rep. 549. In *The Benito Estenger, supra,* the Court said, quoting from Hall and Storey,

> The transfer is not held to be good if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or its profits, or control over it, a power

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[17]In bankruptcy cases, also, the courts have insisted that interfamily transactions "require careful scrutiny," *Wilson v. Robinson,* 83 F. (2d) 397 (C.C.A. 2), cert. dismissed, 299 U.S. 616. *Stroecker v. Patterson,* 220 Fed. 21 (C.C.A. 9); *McKey v. Roetter,* 114 F. (2d) 129 (C.C.A. 7), cert. den. 311 U.S. 691; *Wilson v. Robinson, supra; Rudin v. Steinbugler,* 103 F. (2d) 333 (C.C.A. 2); *Merriam v. Venida Blouse Corp.,* 23 F. Supp. 659 (S.D.N.Y.)

[18]See *Stoehr v. Wallace,* 255 U.S. 239, 242.

[19]Cf.: " 'Enemy property' is a technical phrase peculiar to prize courts, and depends upon principles of public policy as distinguished from the common law." *The Benito Estenger,* 176 U.S. 568, 571 (1900).

> of revocation, or a right to its restoration at the conclusion of the war. [p. 578]
>
> Anything tending to continue the interest of the enemy in the ship vitiates a contract of this description altogether. [p. 579]

Similarly, in *The Island Belle,* Fed. Cas. No. 7107 (D.C. E.D. Pa.), the Court stated "No change of property is recognized where the disposition and control of the vessel continues in the former agent of her former hostile proprietors" (p. 171).

The rule for which we here contend need not go so far as that declared in the prize cases. We need not assert a power to seize property with respect to which there is "anything tending to continue the interests of the enemy". It is enough to hold that a retention by the enemy of powers to control property—whether those powers be expressed in terms of legally enforceable agreements or legally recognizable reservations from a grant or whether they rest in personal relationships and powers of economic coercion over the holder—should be sufficient to characterize the property as enemy property.

Nor is there anything in the fact that the appellant is a citizen of the United States which precludes a holding that the land which he purports to own is enemy in character. Courts have frequently sustained the seizure of property held in the name of American citizens upon finding that the property was in reality owned or controlled by enemies. *Stoehr v. Wallace, supra; Kind v. Clark, supra; Standard Oil Co. v.*

Clark, supra. And the concept of enemy character for purposes of determining the scope of the belligerent power of seizure is not a technical one. Since *Miller v. United States,* 11 Wall. 268, 310-12 (1870), there has been no room for doubt that under some circumstances the property of citizens of the United States could constitutionally be seized as enemy property. Such a seizure may occur where the United States citizen is an inhabitant of the enemy territory, regardless of his personal loyalty. *Miller v. United States, supra; Faber v. United States,* 10 F. Supp. 602, 605 (Ct. Cl.), cert. den. 296 U.S. 596; *Kahn v. Garvan,* 263 Fed. 909, 915 (S.D. N.Y.). It may occur also if the American citizen acts in the interest of the enemy. In the *Miller* case the Court declared (11 Wall. at 312) that

> No recognized usage of nationals excludes from the category of enemy those who act with, or aid or abet and give comfort to enemies. . . .

One form of acting with the enemy may be the mingling with the citizen's goods of enemy property to which a friendly character is to be sought to be given. *The St. Nicholas,* 1 Wheat. 417; *The Fortuna,* 3 Wheat. 236; *The Amiable Isabella,* 6 Wheat. 1. The rule laid down in the Executive Orders that one who acts in the interest of and for the benefit of an enemy is himself an enemy to the extent of such action would seem clearly to come within the principles laid down by these cases.

In short the belligerent power to seize enemy property has always stood outside the requirements of the

Fifth Amendment, which have been held to extend to any "person" whether citizen or alien. *Russian Volunteer Fleet v. United States,* 282 U.S. 481. If, therefore a seizure can legitimately be brought within the scope of that belligerent power, its validity is established. We think there is no warrant for saying that in determining whether a particular seizure is within the limits permitted by the Constitution the Courts can look only to formal ownership, or to formal agreements reserving all the elements of ownership, and must ignore other means of control which as a practical matter are no less effective in leaving the property at the enemy's disposition and under his dominion.

CONCLUSION.

For the foregoing reasons the judgment below should be affirmed.

Dated, San Francisco,
July 15, 1948.

Respectfully submitted,

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